

Department of Industry

Radiocommunication Act

Notice No. DGRB-002-08 — Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements

In *Canada Gazette* Notice No. DGRB-010-07 published on November 28, 2007, Industry Canada initiated a public consultation on proposed conditions of licence to mandate roaming and antenna tower and site sharing and to prohibit exclusive site arrangements. Industry Canada invited interested parties to submit comments no later than January 11, 2008. The Department subsequently extended the deadline to January 22, 2008, in order to synchronize the deadlines for submissions on the *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (AWS Policy Framework) and the *Consultation on the Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements* (DGRB-010-07). Following this deadline, Industry Canada acceded to a request for a two-week reply comment period in order to permit interested parties to respond to the comments received.

Industry Canada is hereby releasing the results of its review of the submissions prior to the application deadline in the AWS auction. This notice discusses several of the points that were raised regarding the proposed amended conditions of licence and sets out a revised set of amended conditions based on the considerations outlined below. This notice also sets out the next steps in the process of ensuring that an arbitration mechanism is in place to facilitate the completion of Roaming Agreements and Site-Sharing Agreements.

It should be noted that the conditions of licence that require licensees to follow Client Procedures Circular 2-0-03 entitled *Radiocommunication and Broadcasting Antenna Systems* (CPC-2-0-03) will remain in effect. Licensees are also required to follow the conditions of licence noted below.

(1) MANDATORY TOWER SHARING

Industry Canada has modified the proposed conditions of licence in response to the submissions on mandated tower sharing as set out below.

Application of the Conditions

As originally proposed, the licence conditions were to apply to all licensees for all services including broadcasting certificate holders. The only exclusions provided for were situations involving sites having national security considerations or sites used for personal enjoyment (e.g. amateur radio operators). Responses to the consultation document identified other legitimate considerations that bear on the services to which these licence conditions should apply. Public utilities noted that their sites are generally located within the confines of enclosures around utility installations (e.g. hydroelectric transformers and switching facilities). Admission to such enclosures is highly restricted and requires specialized training, equipment and procedures to protect personnel and could compromise the integrity of critical utility infrastructure. Public safety agencies expressed similar concerns to those applicable to national security sites requiring highly restricted access. It was also submitted that broadcast sites already tend to be the subject of extensive sharing among broadcasters for technical and economic reasons while generally being poorly suited for other radiocommunication system architectures.

Upon review and analysis, Industry Canada concurs with these observations. Furthermore, of the small number of antenna installations across Canada that become the subject of heightened public concern, the vast majority are used in the provision of commercial wireless telecommunications services such as those currently provided by the cellular and PCS licensees and to be provided by AWS new entrant licensees. This suggests that the two policy objectives that were the drivers for the proposed licence conditions (i.e. to limit the social impacts of a proliferation of new towers and to facilitate new competitive entry into the provision of wireless services) can be realized for the most part by applying these provisions solely to radiocommunication carriers. Accordingly, the amendments to licence conditions regarding tower sharing will apply to radiocommunication carriers in all bands.

Process Overview

The submissions that were received expressed differing views on various aspects of the process. Industry Canada has decided that the antenna tower and site-sharing process as per the conditions of licence will have the characteristics outlined below.

Preliminary Information and Analysis: After having identified a potential site for sharing, the party that wishes to share (Requesting Operator) may contact the site owner/operator who is subject to the conditions of licence that require sharing (Responding Licensee) in order to obtain preliminary information for a technical analysis of the site and in order to prepare a proposal for antenna tower and/or site sharing (Proposal to Share). When asked, the Responding Licensee must provide its available technical data on the site in a timely manner and must allow the Requesting Operator to access the site in a timely manner. The Requesting Operator is responsible for carrying out its own technical analysis.

Submitting a Proposal to Share: After reviewing and analyzing the preliminary information, the Requesting Operator may then submit a Proposal to Share to the Responding Licensee to share the site, including any identification of technical requirements and modifications that the Requesting Operator anticipates are required to permit sharing. The time frames in the conditions of licence commence on the date that the Responding Licensee receives the Proposal to Share. The Responding Licensee is responsible for conducting its own technical analysis, if required, and shall respond within the stipulated time with a draft offer to share in every case where sharing is technically feasible.

Sharing a Site: The operation of a Requesting Operator's radiocommunication system relies on more than just mechanical access to an antenna supporting structure. In order to be considered to be negotiating in good faith, Responding Licensees must offer access to ancillary equipment and services at reasonable commercial rates. Such access and services shall therefore be part of the preliminary information exchange, the negotiations and eventual arbitration if required.

Site Exclusivity: This condition of licence remains essentially the same except that it has been redrafted for greater clarity. Some submissions expressed concern that this was an attempt to bind third parties. That is not the case. Licence conditions do not apply to independent landlords. However, exclusivity provisions may be waived by either party to a lease, including either or both the Licensee and an independent landlord.

(2) MANDATORY ROAMING

Intent of Mandatory Roaming

The AWS Policy Framework of November 2007 and the *Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks* provide the scope of mandatory roaming.

The intent of the policy is to encourage the deployment of advanced networks that provide the greatest choice of basic and advanced services available at competitive prices to the greatest number of Canadians.

Process Overview for Mandatory Roaming

Requests for mandatory roaming on cellular, PCS and AWS licensees' networks will follow the process outlined below.

Preliminary Information and Analysis: The party that wishes to roam (Requesting Operator) may contact the cellular, PCS or AWS licensee who is subject to conditions of licence for mandatory roaming (Responding Licensee) to obtain preliminary information in order to prepare a proposal to enter into a roaming agreement (Roaming Proposal). Upon request, the Responding Licensee must provide available technical information for the roaming services requested in a timely manner.

Submitting a Mandatory Roaming Proposal: The Requesting Operator may submit a Roaming Proposal to the Responding Licensee. This must be clearly identified as a proposal to enter into a mandatory roaming agreement. The timelines for negotiations and arbitration, if required, are set out in the conditions of licence outlined below.

(3) COSTS

Costs incurred at each step in the process will generally be borne by the party carrying out the step. For instance, the cost of technical analyses in the preliminary information stage or carried out in order to prepare or respond to a Proposal to Share, or Roaming Proposal, will be borne by the parties conducting the analyses. The Requesting Operator would not have to compensate the Responding Licensee for costs associated with providing the existing technical information about the site, including the Responding Licensee's review of such requests and technical analysis. Furthermore, the Requesting Operator would not have to compensate the Responding Licensee for costs associated with providing existing technical information related to the mandatory roaming arrangement requested. However, other costs arising as a result of a request will be subject to negotiation with any disputes settled through the arbitration process, if necessary.

Although it is anticipated that, in general, costs associated with the arbitration process will be apportioned equally between the party requesting sharing and the responding party, the final arbitration rules will allow the arbitrator the discretion to allocate costs.

Costs associated with any public consultation or land-use consultation will be the responsibility of the Requesting Operator.

(4) IMPLEMENTING THE CONDITIONS FOLLOWING THE AWS AUCTION

Responding Licensees must respond to requests for information and Proposals to Share, or Roaming Proposals, received from a provisional licence winner during the period of time that the Minister is in the process of determining eligibility. This is being done to expedite provisional licence winners' entry into the market.

(5) DISPUTES OVER TECHNICAL FEASIBILITY

If a Responding Licensee, after conducting its technical assessment, considers a Roaming Proposal or a Proposal to Share not to be technically feasible, then the Responding Licensee must inform the Requesting Operator of this as soon as possible and provide the appropriate technical rationale. If the Requesting Operator disagrees with this assessment, it may ask Industry Canada to render a decision on technical feasibility.

As stated in Industry Canada's document entitled *Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks*, the Department expects that roaming and sharing will be technically feasible in the vast majority of cases. Where disagreement exists over other issues, it can be dealt with through either commercial negotiations or the binding arbitration process, if necessary.

Industry Canada will release further details on its process for conducting its technical feasibility review under these conditions of licence. Unless otherwise directed, a technical feasibility review will not alter the timelines to complete negotiations or proceed to arbitration, if required.

(6) NEGOTIATION PROCESS

Negotiations to be completed within a stipulated time: Within the process outlined above, the Requesting Operator and Responding Licensees may choose to negotiate or use any agreed upon arbitration or mediation process in order to finalize the negotiation process within the timelines set out in the conditions below. Note that, by agreement, the parties may choose to extend their own negotiation process. However, should the timelines outlined in the conditions below expire, then, in the absence of any final or interim agreement, either party may initiate the arbitration process and both parties will be compelled to follow that process and the arbitration rules that will be established by Industry Canada as set out below.

(7) ARBITRATION

The Arbitration Rules

Disputes with respect to any of the above issues, other than technical feasibility, which are not resolved by negotiation, shall be submitted to binding arbitration at the request of either party. Industry Canada will, at a time to be announced, undertake a stakeholder consultation session, inviting those who submitted comments. Others who will be subject to, or affected by, the roaming and sharing conditions of licence will be welcome to participate. Industry Canada will also invite representatives from ADR Chambers, who will provide the first roster of qualified arbitrators and who will coordinate arbitration requests and administer the arbitrations under this procedure. The goal of this session will be to assist

Industry Canada in developing a final version of the arbitration procedures and rules, which will be incorporated by reference into the conditions of licence.

That being said, Industry Canada is of the view that the arbitration process rules should include the characteristics set out below.

Arbitrations shall be initiated by a concise notice, the form of which can be set out in the rules. Either party may initiate the arbitration process.

It is recognized that complex situations will arise where a three-arbitrator model is the best approach, such as a request for national roaming or a multi-site tower agreement. For simple situations, such as a request to share one tower, one arbitrator and the use of a final offer arbitration model would be more efficient and effective. To that end, the arbitration rules should allow for both and outline the specific situations where one model is to be used over the other.

The parties can agree on an arbitrator(s) from ADR Chambers identified as part of the roster. A rule will be put in place to assign one (or three) arbitrators to conduct the arbitration (the arbitral tribunal).

Similarly, the parties can agree to a venue, time, choice of official language, etc. The venue may include the head office or other office of ADR Chambers or any other suitable location, failing which the arbitral tribunal may decide. The costs associated with the venue and the costs of the arbitral tribunal to travel (if required) will be part of the costs of arbitration.

The arbitral tribunal will be given the usual discretion to deal with procedural issues as they arise, such as setting timelines, disclosure of information, evidence at the hearing etc. In general, it is expected that:

- (1) the evidence brought forward during an arbitration will be dealt with on a confidential basis except that summaries or extracts from the final decision (excluding sensitive commercial information) will be published to assist future arbitral tribunals;
- (2) costs of the arbitration will typically be apportioned equally, but the arbitrator will have the ability to vary this;
- (3) there will be rigorous timelines within the arbitration processes, but these can be altered by agreement of the parties or by the arbitral tribunal;
- (4) at any time, the Responding Licensee and the Requesting Operator may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on consent;
- (5) arbitral awards will be final and binding with no right of appeal subject to applicable provincial or territorial legislation.

These issues will be discussed in the stakeholder consultation session and published in the detailed arbitration rules.

(8) CONDITIONS OF LICENCE FOR MANDATORY ANTENNA TOWER AND SITE SHARING AND TO PROHIBIT EXCLUSIVE SITE ARRANGEMENTS

These conditions of licence will apply to all licensees in all bands who are radiocommunication carriers under the *Radiocommunication Act*.

1. The Licensee must facilitate sharing of antenna towers and sites, including rooftops, supporting structures and access to ancillary equipment and services (“Sites”) and not cause or contribute to the exclusion of other radiocommunication carriers from gaining access to Sites. Without limiting the generality of the foregoing,
 - (a) where the Licensee is party to an agreement that includes a provision excluding other operators from the use of a Site, then, in order to facilitate the sharing of Sites, the Licensee must consent to waiving that portion of the agreement to facilitate a Request to Share;
 - (b) as applicable, the Licensee must consent to, or in a commercially reasonable manner, seek the consent of third parties to the assignment, sublease or other rights of access to Sites pursuant to any agreement or arrangement to which the Licensee is a party; and
 - (c) the Licensee must not enter into or renew agreements that exclude other operators from using a Site.
2. The Licensee must share its Sites containing antenna-supporting structures where technically feasible, when requested to do so by any other radiocommunication carrier authorized under the *Radiocommunication Act* or by a party who is a provisional licence winner following the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (“A Requesting Operator”).
3. In order to satisfy the condition of Site sharing in accordance with this licence, the Licensee must respond, in a timely manner, to an initial request for information by a Requesting Operator as follows:
 - (a) the Licensee shall provide to the Requesting Operator any preliminary technical information for each Site, such as drawings, surveys, technical data, engineering information, future requirements, lease provisions and other information relating to the site relevant to formulating a Proposal to Share that it has in its possession or control; and
 - (b) upon reasonable notice by the Requesting Operator, the Licensee shall facilitate access to the Site so that a formal Proposal to Share can be formulated.
4. The Licensee must respond to a Proposal to Share from a Requesting Operator within 30 days as follows:
 - (a) The Licensee must provide the Requesting Operator with a response in writing and an offer to enter into a Site-Sharing Agreement. Industry Canada expects that Site-Sharing Agreements, including access to ancillary equipment and services, will be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar access;

(b) In the event that the Licensee believes that the Proposal to Share is not technically feasible, the Licensee must provide the Requesting Operator with a response detailing the reasons why it considers that site sharing is not feasible (accompanied by any applicable technical information) and submit that evidence to Industry Canada as directed if the Requesting Operator requests that Industry Canada review the reasons provided by the Licensee in accordance with this condition.

5. Notwithstanding the Licensee's initial response, if Industry Canada reviews the matter of technical feasibility under 4 (b) above and finds that sharing is technically feasible, then the Licensee will respond to the Proposal to Share with an offer to enter into a Site-Sharing Agreement in a timely manner.

6. Licensees must negotiate with a Requesting Operator in good faith with a view to concluding a Site-Sharing Agreement in a timely manner.

7. If after 90 days from the date that the Licensee receives a Proposal to Share, the Licensee and the Requesting Operator have not entered into a Site-Sharing Agreement or have not agreed to any interim arrangement, the Licensee must submit or agree to submit the matter to arbitration in accordance with *Industry Canada's Arbitration Rules and Procedures*, as amended from time to time. The Licensee shall agree that the arbitral tribunal shall have all necessary powers to determine all of the questions in dispute (including those relating to determining the appropriate terms of the Site-Sharing Agreement and those relating to procedural matters under the arbitration) and that any arbitral award or results under this condition of licence shall be final and binding with no right of appeal subject to applicable provincial or territorial legislation. The Licensee must participate fully in such an arbitration and follow all directions of the arbitral tribunal in accordance with *Industry Canada's Arbitration Rules and Procedures* and any arbitration procedures established by the arbitral tribunal.

(9) CONDITIONS OF LICENCE FOR MANDATORY ROAMING

The conditions of licence described below will apply to all licensees in the cellular, PCS and AWS bands.

Where the conditions of licence refer to a "A new entrant" or "A national new entrant," definitions can be found in the AWS Policy Framework of November 2007 and the subsequent *Responses for Clarification on the AWS Policy and Licensing Frameworks* of February 2008.

1. The Licensee must provide automatic digital roaming (roaming) by way of Roaming Agreements, on its cellular, PCS and AWS networks to any of the parties defined below ("A Requesting Operator"):
 - (a) To all cellular, PCS and AWS licensees outside of their licensed area, for at least the 10-year term of the AWS licences. For clarity, the licensed areas will be viewed as any area in which the Requesting Operator holds a licence for any of cellular, PCS or AWS spectrum;
 - (b) To all new entrants, in their licensed areas for a period of five years commencing with the date of issuance of their licence;
 - (c) To national new entrants who have substantially met the five-year roll-out requirements outlined on their licence, as determined by Industry Canada, for an additional five years; and

(d) To a party who is a provisional licence winner following the Auction for Spectrum Licences or Advanced Wireless Services and other Spectrum in the 2 GHz Range and who will meet one of the criteria set out in subsection (a) or (b) above.

2. For greater certainty, the roaming which must be offered in accordance with this licence condition is defined by the following characteristics:

(a) Roaming must enable a subscriber (a Roamer) already served by the Requesting Operator's network (Home Network) to originate or terminate communications on the Licensee's network when out of range of the Home Network, wherever technically feasible;

(b) The roaming offered must provide connectivity for digital voice and data services, including access to the public-switched network and the Internet, regardless of the spectrum band or underlying network technology used, provided that the Roamer's device is capable of accessing the Licensee's network. Roaming should provide a Roamer with the ability to access voice and data services offered by the Requesting Operator's network at a level of quality comparable to that offered for similar services by the Licensee's Home Network. For greater certainty, this condition does not require the Licensee to provide to a Roamer a service which the Licensee does not itself provide on its own Home Network; nor to provide to a Roamer a service, or level of service, which the Requesting Operator will not or does not itself provide;

(c) Roaming as provided for in this condition does not include resale;

(d) Roaming can commence as soon as the Requesting Operator is offering service on its own radio access network and a Roaming Agreement is in place;

(e) Roaming does not require communications hand-off between home and host networks such that there is no interruption of communications in progress;

(f) Roaming should function without the need for any special facilitating action by the customer.

3. In order to satisfy the condition of roaming in accordance with this licence, the Licensee must respond to a request for information by a Requesting Operator in a timely manner by providing preliminary technical information to the Requesting Operator such as technical data, engineering information, network requirements, and other information relevant to formulating a Roaming Proposal.

4. The Licensee must respond to a Roaming Proposal from a Requesting Operator within 30 days as follows:

(a) The Licensee must provide the Requesting Operator with a response in writing and an offer to enter into a Roaming Agreement. Industry Canada expects that Roaming Agreements will be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar roaming services;

- (b) In the event that the Licensee believes that the Roaming Proposal is not technically feasible, the Licensee must provide the Requesting Operator with a response detailing the reasons why it considers that roaming is not feasible (accompanied by any applicable technical information) and submit that evidence to Industry Canada as directed if the Requesting Operator requests that Industry Canada review the reasons provided by the Licensee in accordance with this condition.
5. Notwithstanding the Licensee's initial response, if Industry Canada reviews the matter of technical feasibility under 4 (b) above and finds that Roaming is technically feasible, then the Licensee will respond to the Roaming Proposal with an offer to enter into a Roaming Agreement.
6. Licensees must negotiate with a Requesting Operator in good faith, with a view to concluding a Roaming Agreement in a timely manner.
7. If after 90 days from the date that the Licensee receives the Roaming Proposal, the Licensee and the Requesting Operator have not entered into a Roaming Agreement or have not agreed to any interim arrangement, the Licensee must submit or agree to submit the matter to arbitration in accordance with *Industry Canada's Arbitration Rules and Procedures*, as amended from time to time. The Licensee shall agree that the arbitral tribunal shall have all necessary powers to determine all of the questions in dispute (including those relating to determining the appropriate terms of the Roaming Agreement and those relating to procedural matters under the arbitration) and that any arbitral award or results under this condition of licence shall be final and binding with no right of appeal subject to applicable provincial or territorial legislation. The Licensee must participate fully in such an arbitration and follow all directions of the arbitral tribunal in accordance with *Industry Canada's Arbitration Rules and Procedures* and any arbitration procedures established by the arbitral tribunal.

(10) NEXT STEPS

Industry Canada will organize a stakeholder consultation session to assist the Department in developing Industry Canada's arbitration rules and procedures. Radiocommunication carriers who will be subject to, or affected by, the roaming and sharing conditions of licence will be welcome to participate in this consultation. Industry Canada will invite those who submitted comments on *Canada Gazette Notice No. DGRB-010-07* to participate, as well as representatives from ADR Chambers. The time, date and location of the stakeholder consultation session will be the subject of a subsequent notice to be published on Industry Canada's Spectrum Management and Telecommunications website in due course.

Industry Canada intends to release brief guidelines on its process for reviewing disputes over technical feasibility.

Upon release of the above-noted materials, Industry Canada will also provide a timeline for the implementation of the licence conditions.

In the meantime, any questions regarding this notice may be addressed to the Director, Spectrum Management Operations, Radiocommunications and Broadcasting Regulatory Branch, Industry Canada, 300 Slater Street, Ottawa, Ontario, K1A 0C8.

(11) OBTAINING COPIES

Copies of this notice and documents referred to are available electronically on Industry Canada's Spectrum Management and Telecommunications website at <http://ic.gc.ca/spectrum>.

Official versions of *Canada Gazette* notices can be viewed on the [Canada Gazette](http://canadagazette.gc.ca/partI/index-e.html) website at <http://canadagazette.gc.ca/partI/index-e.html>. Printed copies of notices can be ordered by telephoning the sales counter of Canadian Government Publishing at 613-941-5995 or 1-800-635-7943.

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